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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS SANDOVAL,

Defendant and Appellant.

B249138

(Los Angeles County
Super. Ct. No. BA402259)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed and remanded with directions.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged Jesus Sandoval with three counts of assault with a deadly weapon, (counts 1, 2 and 7) and one count of dissuading a witness (count 6). Sandoval's father was charged with two counts of making criminal threats (counts 3 and 4) and Sandoval's girlfriend was charged with one count of assault by means likely to produce great bodily injury (count 5). During jury deliberations, the court dismissed Juror No. 4 for failing to deliberate and replaced her with an alternate. The reconstituted jury found Sandoval guilty of two of the assault counts, not guilty of the third count and not guilty of dissuading a witness. It acquitted Sandoval's father of one count of making a criminal threat and deadlocked on the other count. The jury found Sandoval's girlfriend guilty of simple assault. (She is not a party to this appeal.)

We affirm Sandoval's convictions because the record establishes as a "demonstrable reality" that Juror No. 4 failed to deliberate.¹

FACTS AND PROCEEDINGS BELOW

Sandoval, his father and his girlfriend were tried together.

Late in the first day of jury deliberations the foreperson sent a note to the court stating that the jury had reached a verdict on every count but one and the jurors all agreed "their vote is unlikely to change." The foreperson asked the court how to proceed. The court did not respond to the note that day.

When the jurors returned in the morning the court called them into the courtroom and asked the foreperson which count was still at issue, the numerical breakdown of the vote and whether there was anything the court or the attorneys could do to help the jury reach a verdict. The foreperson answered that the jury was divided 8 to 4 on count three (one of the criminal threat charges against Sandoval's father) and there was nothing the court or the attorneys could do to help. The court then asked the foreperson whether the jury might be able to reach a verdict on count 3 if they deliberated further. The

¹ Because the court erred in sentencing Sandoval to a three-year term for the great bodily injury enhancement on Count 2, instead of one-third the full term as required by Penal Code section 1170.1, subdivision (a), we remand the case to the trial court for resentencing.

foreperson responded, “There is that possibility.” When the jury went home yesterday, the foreperson explained, “[E]verybody felt pretty settled into their decisions . . . but it has been one day. And there is the potential to further the discussion, at least to see, because we haven’t had an opportunity this morning to take another vote and see where that’s that.”

The court asked the jury to return to its deliberations on count 3 “at least for a little while longer.”

Soon after the jurors retired for further deliberations the foreperson sent a second note to the court. This note stated: “We have reached a verdict on all counts except for one count. This Count is the same one as this morning: Count 3. We are split 7-5 on Count 3 with all parties stating they are entrenched in their decision, with no foreseeable testimony or discussion that could alter any vote. How would you like us to proceed?” The record does not contain the court’s response to this note.

Later, but still in the morning, the foreperson sent the court a third note that stated: “We cannot move forward with a decision with Juror Number 4 as a member of our panel. She has admitted to bias and has expressed a sustained unwillingness to participate. We are requesting an alternate.”

Upon receiving this note the court interviewed Juror No. 2 (the foreperson), Juror No. 4 and other randomly selected jurors in chambers. Counsel for the parties were present.

Juror No. 2, the foreperson, told the court that from the beginning of the deliberations on the first day Juror No. 4 showed “an unwillingness to partake in the discussions.” In addition, she said, Juror No. 4 “gave all credibility to one side, and it was in a way that was extremely disparaging of the other.” When Juror No. 2 asked Juror No. 4 ““Are you biased on this?”” Juror No. 4 responded, ““This is not a bias; this is just the way that I feel.”” Juror No. 2 further stated that Juror No. 4 “did not want to participate, did not waver, was bringing up extraneous things.” The things she brought up “had to do with things that were outside of the scope of what was said [by others].”

Later in the first day, Juror No. 2 stated, Juror No. 4 “change[d] her verdict to be in line with what the group was saying.” Juror No. 4 commented “that she was too busy to be here, that she didn’t want to be here.” However, when Juror No. 2 asked Juror No. 4 if she was changing her verdicts because she wanted to leave, Juror No. 4 denied this and listed as her reasons for her vote the same reasons the other jurors had expressed.

Juror No. 2 then described to the court what had transpired earlier that morning. When the jurors reconvened Juror No. 4 came in late, did not sit at the table with the other jurors but instead sat on the couch and declined to participate in the discussion. When the bailiff brought the verdict forms into the jury room, Juror No. 4 got up and went into the bathroom. When she returned, she sat back down on the couch. Juror No. 2 stated she asked Juror No. 4 if she “would like to join us?” And Juror No. 4 said, “No, I’m fine sitting right here.” “What is there to discuss?” Juror No. 4 added, “I thought we decided on everything.” Juror No. 2 responded that she did not feel “comfortable” moving forward because she did not feel that Juror No. 4 believed her answers. According to Juror No. 2, when asked directly Juror No. 4 admitted “I don’t believe my answers. I am biased and I do not want to be here.” Juror No. 2 told the court that she previously believed Juror No. 4 had an “honestly held disagreement with the rest of [the jury]” but she would go along with them “to be done and to go back to work[.]” This morning, however, Juror No. 4 announced: “I’m not in agreement. I do not believe any of this. I don’t want to be here.”

Juror No. 8 said that Juror No. 4 did not participate in the discussion of the case but “shut down” from the beginning. The juror described Juror No. 4’s general attitude as “I don’t want to deal with this” meaning “I don’t want to deal with this kind of case where I’m going to make a judgment about somebody, no matter what the facts are.” Juror No. 8 further observed that Juror No. 4 offered her views on the case but “they were prejudicial to the whole case” and not related to the facts. In Juror No. 8’s view, Juror No. 4 finally took the position “Okay. I’ll go along just to be done.”

Juror No. 6 answered “no” when the court asked: “Do you feel that Juror Number 4 has participated in good faith in the deliberations?” Juror No. 6 said “it seemed as though [Juror No. 4] had made up her mind before she even got into the room and it seems like even maybe right when everything started.” Juror No. 6 told the court that Juror No. 4 did not discuss the evidence. “She talks about the way she feels.” Juror No. 6 also told the court that Juror No. 4 “seemed as though she had made up her mind before she even got into the room” Juror No. 6 corroborated the belief of Juror No. 8 and Juror No. 2 that Juror No. 4 eventually decided to agree with the others just to “get out of here.”

Juror No. 9 stated Juror No. 4 had her mind made up “from the get-go.” “It didn’t seem like she was participating,” Juror No. 9 said. “She kind of just agreed and said something like, “I’ll just agree because I need to get out of here[.]”” Moreover, Juror No. 4 did not try to explain to the rest of the jurors the reasons for her views or try to get them to see her point of view. She sat on the couch and refused the invitation to join the other jurors at the table.

When the court interviewed Juror No. 4 she gave a different version of the jury’s deliberations. She told the court that she did not feel the other jurors listened to her views and that she felt “bullied into making a decision that I’ve wrestled with all night last night.” When the court asked her: “Do you feel you’ve listened with an open heart and mind to [other jurors’] views?” She answered “yes.” Contradicting the statements of the other jurors, Juror No. 4 stated that she took her jury service “very seriously” and, “in my heart, I just cannot go along with” the other jurors’ decisions. Asked whether her “mind was made up” when she first entered the jury room, Juror No. 4 answered: “Yeah. I thought we had to go in with a determination of where we’re at.” She told the court: “I’ve listened very carefully to [the court’s] instructions, and I felt like I arrived at my decision based on the instructions[.]” “[P]art of the jury instruction,” she explained, “was to determine the believability of the witnesses and that’s where I’m looking at the believability of the witnesses and I have doubt.” Juror No. 4 told the court that she

listened to the opinions of the other jurors and argued with them but in the end she disagreed with them. The other jurors were not basing their decisions on the evidence and the instructions, she told the court, but were “on a mission.” For example, she believed other jurors’ opinions were not based on the evidence because she took “pages of notes” and “they haven’t written a word.” She also said that other jurors would fail to make findings on all the factors required by an instruction but were “cherry picking” certain ones. “I’m not a shy person,” Juror No. 4 told the court, “I just feel like the lone combative juror.”

After the interviews with the jurors the People moved to dismiss Juror No. 4 for failing to deliberate. The court granted the motion and appointed an alternate juror to take her seat. After deliberating for approximately three more hours the jury announced that it had reached a verdict on all but one count. The court declared a mistrial on that count.

The court sentenced Sandoval to consecutive prison terms totaling nine years for the assaults and inflictions of great bodily injury.

DISCUSSION

I. STANDARD OF REVIEW: THE “DEMONSTRABLE REALITY” TEST.

Penal Code section 1089 states in relevant part: “If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefore, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.” This statute has been interpreted to permit the court to remove a juror who refuses to deliberate on the theory that such a juror is “unable to perform his duty.” (*People v. Cleveland* (2001) 25 Cal.4th 466, 474-475.)

Although the standard of review is abuse of discretion, our review of the court's discharge of a juror during deliberations "entails a more comprehensive and less deferential review" of the court's use of its discretion. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) A juror's inability to perform as a juror must "appear in the record as a demonstrable reality." (*People v. Williams* (2001) 25 Cal.4th 441, 447-448.)

In *People v. Barnwell, supra*, our Supreme Court explained how this heightened standard of review should be applied.

"The demonstrable reality test . . . requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] . . . [¶] The evidence bearing on the question whether a juror has exhibited a disqualifying bias during deliberations may be in conflict. Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it. [Citation.] In such a case the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony. The trial court may also draw upon the observations it has made of the jurors during voir dire and the trial itself. Naturally, in such circumstances, we afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal. (*People v. Barnwell, supra*, 41 Cal.4th at pp. 1052-1053.)

II. THE RECORD ESTABLISHES AS A "DEMONSTRABLE REALITY" THAT JUROR NO. 4 REFUSED TO DELIBERATE.

People v. Cleveland, supra, is the leading California case concerning the discharge of a juror who refuses to deliberate. The court defined refusal to deliberate as "a juror's unwillingness to engage in the deliberative process; that is, he or she will not

participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.)

The court also recognized the possibility that the impetus for a juror’s dismissal might stem from that juror’s views on the merits of the prosecution’s case. The court stated that it agreed with federal circuit court opinions holding that “a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution’s evidence.” (*People v. Cleveland, supra*, 25 Cal.4th at p. 483.)² Nevertheless, the court rejected the federal courts’ position that a trial court may not dismiss a juror if there is a “reasonable possibility” that the juror’s views on the merits of the case provided the impetus for the removal. (*Ibid.*) “Rather,” the court stated, “we adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct ‘whatever inquiry is reasonably necessary to determine’ whether [grounds to discharge] exist . . . and to discharge the juror if it appears as a ‘demonstrable reality’ that the juror is unable or unwilling to deliberate.” (*Id.* at p. 484.)

In the case before us the trial court discharged Juror No. 4 for failing to deliberate because it determined the juror’s “mind was made up” when the jury first began its deliberations. The record supports the trial court’s conclusion.

It is clear from *People v. Cleveland* that a finding of inability to perform the duties of a juror may not be based on the juror taking a position contrary to that of the other

² The court was referring to the opinions in *U.S. v. Brown* (D.C. Cir 1987) 823 F.2d 591, 596, *U.S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, 622, and particularly the Ninth Circuit’s opinion in *U.S. v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087.) (*People v. Cleveland, supra*, 25 Cal.4th at pp. 480-483.)

jurors or questioning the sufficiency of the prosecution's evidence. (*People v. Cleveland, supra*, 25 Cal.4th at p. 483.) Here, however, the record supports the trial court's conclusion that Juror No. 4 made up her mind immediately after hearing the court's instructions and refused to consider the other jurors' views. When asked whether her "mind was made up" when she first entered the jury room, Juror No. 4 answered: "Yeah." She explained: "I've listened very carefully to [the court's] instructions and I felt like I arrived at my decision based on the instructions[.]" Juror No. 4's failure to deliberate was also shown by her comments on several occasions that she did not want to be deliberating and that she changed her votes to go along with the other jurors just so that she could leave and get back to work. The other jurors the court interviewed were unanimous in telling the court that Juror No. 4 did not consider their opinions. Finally, Juror No. 4's body language of sitting by herself on the couch and disappearing into the bathroom when it was time for a vote further demonstrated her failure to deliberate the issues with her fellow jurors.

Expressing a fixed conclusion at the beginning of deliberations, refusing to consider other points of view and separating herself physically from the other jurors are all cogent examples of a juror's refusal to deliberate. (*People v. Cleveland, supra*, 25 Cal.4th at p. 485.)

DISPOSITION

Jesus Sandoval's convictions are affirmed. The case is remanded for Sandoval's resentencing.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.